VIRGINIA LAW REGISTER

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American Citizenship.

American citizenship has been treated all too lightly in the past. It has been too easily acquired by those who did not deserve or appreciate its blessings. Under the stress of the present time we have come to realize its value and possibilities. We have seen how it has been abused by many naturalized citizens, especially those who have taken the oath of allegiance with a "mental reservation in favor of Germany." One of the good effects of this war will be to make American citizenship mean more in the future than it has in the past. It will be more highly prized and protected. Only those who measure up to the standard of 100% loyalty and who conduct themselves as true Americans should ever again be permitted to be naturalized. No resident alien who has been interned or who has failed to do his part in aiding the United States in this war can measure up to this standard. We have enough of the disloyal and slacker type already among our citizenship without ever adding another so contaminated. Congress should amend the naturalization law with this idea in view so as to bar any such from citizenship. On the other hand it should be made easier for desirable resident aliens to become naturalized. Not that any of the present restrictions that hedge about citizenship should be removed, but the government should furnish means for rendering such aliens qualified to assume citizenship, and they should be made to feel welcome to join Uncle Sam's big family when they measure up to the requirements. There are entirely too many people in this country who make it their home, and make from it their livelihood, and oftentimes fortunes, who have never shown the slightest interest in becoming citizens. Such people outrageously abuse American hospitality. If they do not want

citizenship in the land to which they have come of their own free will they should return to the sovereignty of their allegiance. In common parlance they should either "treat or travel."

B. S.

Cancellation of Certificate of Citizenship of Native of Germany.

Public policy at all times requires that one seeking naturalization should exercise the utmost good faith in all of the essentials required of him. One of these essentials of utmost importance is the renunciation of all allegiance to any foreign sovereignty. There can be no such thing as taking the oath of allegiance with a mental reservation in favor of the country of birth. It has been claimed that many of our citizens of German birth have done this and retained toward Germany an allegiance which the laws of this country require to be renounced before they become citizens among us. It is reported that some time ago a naturalized citizen on trial for attempting to evade military service openly stated that he took the oath of allegiance with a "mental reservation in favor of Germany."

In a proceeding in the United States District Court for the District of New Jersey to cancel a certificate of citizenship of a naturalized citizen of German birth (United States *v.* Wursterbarth, 249 Fed. 908) this mental reservation was inferred to have existed at the time of his naturalization where it appeared that on three separate occasions since the outbreak of the War with Germany he gave vent to expressions which clearly indicated that at this time he bears an allegiance to the country of his origin superior to that which he recognizes to this country. This case is one of first impression and is of unusual interest at this time when we are engaged in a death struggle with the country favored by the "mental reservation" of some of our citizens who may be called upon to surrender their citizenship because of such mental reservation. Upon the hearing the government proved the following facts: Soon after the outbreak of the war Wursterbarth was solicited to contribute money to, and become a member of, the American Red Cross. He angrily refused to do

so, stating he would do nothing to injure the country in which he had been born and educated; that he would give no money to send soldiers there, and that the solicitor did not know what it meant to be born in a country, and then have men go over and fight against that country. Later he was asked to subscribe to the Y. M. C. A. fund for war work. He stated that he would do nothing to help defeat Germany, and that he did not want America to win the war as he had relatives in Germany. He made the same rejoinder to the question as to whether he did not want American soldiers in camps and cantonments to be well taken care of; and in reply to a statement made to him that he was better off than most Americans, he said that he only came to this country on a vacation or visit. The respondent did not attempt to refute or explain any of the testimony.

It was properly held that this proof unexplained warranted the cancellation of his certificate of citizenship on the ground that it was procured by fraud in that his oath to renounce allegiance to any foreign sovereignty as required by Rev. St. § 2165 was false, and excepted the land of his nativity.

While the respondent's present state of mind was, of course, not the main fact in issue, yet from the facts of the case it was proper to infer that he was of the same mental inclination at the time of his naturalization. The court said:

> "As the years succeeding his naturalization passed, coupled with the fact that he continued to dwell in our midst, associate with our citizens, receive the benefits which this nation and its institutions have conferred upon him, acquire property here, and hold public office (as the proofs show that he did), it is natural to presume that his affection and feeling of loyalty and allegiance to this country would increase, and that any ties which bound him to the country from which he came would correspondingly decrease. If, therefore, under such circumstances, after 35 years, he now recognizes an allegiance to the sovereignty of his origin, superior to his allegiance to this country, it seems to me that it is not only permissible to infer from that fact, but that the conclusion is irresistible, that at the time he took the oath of renunciation, he did so with a mental reservation as to the country of his birth, and retained towards that country an allegiance which the laws of this country required him to renounce before he could become one of its citizens. Indeed,

> for the reasons just stated, his allegiance to the former must at that time have been stronger than it is at present. Whatever presumption might otherwise arise in his favor from the apparent fact that during the intervening years he has lived as a good citizen of this country is of no weight, when it is considered that nothing has happened during that time to call forth a manifestation of his reserved allegiance, and that as soon as something did happen—i. e., the war between this country and Germany—he immediately manifested it."

In a similar case before the United States District Court for the Western District of Washington (United States *v.* Darmer, 249 Fed. 989) it appeared from the petition that during the Second Liberty Loan drive a committee asked Darmer to buy a Liberty Bond and that he said he was of German descent, and that, if he bought any Liberty Bonds it would be the same as kicking his own mother, and refused on that ground; and when the committee called his attention to the attitude taken by Germany, and the things done by Germans to American citizens, he said he didn't believe a word of it, and he further said that he would rather throw all his property into the bay than buy one $50 Liberty Bond. Upon motion to dismiss the petition it was held sufficient. In referring to the expressions attributed to the defendant the court said:

> "The language charged to have been used by him, standing by itself, tends to show loyalty and allegiance to Germany, rather than to the United States. Such positive expressions of alien allegiance repeatedly made during a year's time, unexplained, give rise to a presumption of some continuity and duration of existence. Whether the feeling expressed existed in a stronger or weaker state, or not at all, in 1888, cannot be determined merely from the allegations of the complaint. Evidence alone can establish that; but, as attachments generally are weakened by length of time and absence from the cherished object, the contention that it is more likely that it was stronger then than now cannot be said, in the absence of explanation, to be altogether unreasonable."

It should be borne in mind that the defendants in these cases did not express any dissatisfaction with the aims and purposes of this country in the present war, or with the reasons which had induced Congress to declare war, but that they boldly took the

position that they would do nothing to injure the country of their birth, thus showing that they did not wish this country to win the present war, because of the ties which bound them to Germany. Clearly such a state of mind on the part of a naturalized citizen of German birth is amply sufficient to furnish grounds for the cancellation of his certificate of citizenship.

B. S.

Evasion of Law by Draftees.

Oscar Samuel Miller, by profession a lawyer, in an attempt to adjust his own affairs overlooked a small matter—*minutiae*—and proved the well known adage that a man acting as his own lawyer has a fool for a client. Miller was liable to service under the Selective Draft Act but sought exemption "as a married man whose wife or child is dependent upon him for support." The possession of some money was inconsistent with this claim so it was conveyed to a trustee for ten years, by a declaration of trust and assignment of mortgage. The property assigned was of the value of $25,300, and provided an income of $1,700 per annum. Under the assignment the principal and interest were to be invested and reinvested for said term; but none of the interest or property was to be paid over to the assignor, or any one for him, until the expiration of said 10 years, except the payment out of the income of $480, the interest on a $6,000 mortgage upon his home. After the execution of the trust above stated Miller was regularly drawn and designated for military service; and being so drawn and notified he made out on the 10th day of September, 1917, an affidavit and presented the same to the local board, claiming exemption because his wife was dependent on him for support and he had no source of income except his law practice, and wherein he alleged that he owned only the property listed and none other, to-wit, his home, subject to a $6,000 purchase-money mortgage, an automobile, small library, and office furniture; that his only source of income was his law practice. The local board allowed Miller's claim, which action was duly approved by the district board. It seems apparent that such a transfer constituted an evasion of the draft law as unpardonable if not more so than the fleet footed

who have gone to other countries to avoid its provisions. The United States District Court thought so on a demurrer to an indictment setting forth the above facts, a full report of the decision will be found in 249 Fed. 985. The point overlooked by the defendant Miller, and which the court held him liable to an indictment for perjury on his affidavit claiming exemption, was his failure to state that he had an income of $480 to meet his alleged indebtedness of $6,000 on his home. So even had the defendant been successful with his original trust deed, his failure to claim all the benefits thereof has placed him in his proper class, and instead of the proud wearer of the O. D. under the Stars and Stripes we may look to see him in a Federal penitentiary surrounded by stripes but without the stars.

D. McB.

Waiver of Rights by Soldiers and Sailors.

A reading of the "Soldiers' and Sailors' Civil Relief Act," a synopsis of which is published in this issue, will reveal the benefits offered to our fighters by this legislation which while granting immunity at the same time contains clauses whereby its protective provisions can not be made the means of fraud upon the part of those whom it was intended to protect. The act is yet too recent to have been the subject of any decisions by the courts but an attempt to evade it has come to the attention of the writer in that when contracts are made by those whom it was intended to protect either in the present or future, it was embodied therein that any provisions of the act in so far as they were applicable to the particular contract were waived.

There is nothing in the act itself preventing such a stipulation in the contract, moreover as a general rule there is nothing to prevent an individual from waiving rights specially conferred upon him. In the present instance the waiver of such rights would clearly appear to be in conflict, if not with any particular provision, at least with the object and purpose of the act as expressed in § 100 "to enable them to devote their entire energy to the military needs of the nation." Certainly it is not to be denied that our fighting men have sufficient burdens and dangers, both dis-

closed and secret, without adding thereto the uncertainty of the protection being given their relatives or property at home. There is nothing that would tend more to disrupt the morals of the troops when the periods of excitement due to fighting are over and they return to rest to have that rest disturbed by lurking fears of a danger which if real they are powerless to avert by having waived the protection afforded them. To avoid this any stipulation waiving the benefits of this act should be declared void as against public policy. D. McB.

Treaty as Affecting Operation of Selective Service Law—Spanish Subjects.

The effect of treaties and acts of Congress, when in conflict, is not settled by the federal Constitution, but the question is not involved in any doubt as to its proper solution. Art. 6 § 2 of that instrument provides that: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under authority of the United States, shall be the supreme law of the land." It is easily seen that a treaty is placed on the same footing and made of like obligation with an act of Congress. Both are declared by that instrument to be supreme law of the land and no superior efficacy is given to either over the other. When they relate to the same subject, the courts will construe them so as to give effect to both, if that can be done without violating the language of either. But when a treaty and an act of Congress are inconsistent the latest in point of time will control.

It has long been the rule of decision in the United States that in so far as the judicial department of the government is concerned a treaty occupies no position of superiority over an act of Congress. A treaty may supersede a prior act of Congress and may itself be superseded by a subsequent act of that body. It is subject to such legislation as may be passed for its enforcement, modification or repeal. (Cherokee Tobacco Cases, 11 Wall. 616, 621, 20 L. Ed. 227; Head Money Cases, 112 U. S. 580, 598, 5 Sup. Ct. 247, 28 L. Ed. 798; Whitney *v.* Robertson, 124 U. S. 194.)

Where an earlier treaty and a later act of Congress conflict. the courts are bound to accord to the act of Congress compelling

authority; they can afford no redress but must remit one who claims rights or privileges under the treaty, which are denied to him by the act of Congress, to the political department of the government. This question has been lately decided by the United States District Court for the Southern District of California in Ex parte Larrucea, 249 Fed. 981, wherein the question for decision was the effect of the existing treaty between the United States and Spain as exempting a subject of the latter from the operation of the Selective Service Law. This treaty provides that: "The citizens or subjects of each of the high contracting parties shall be exempt in the territories of the other from all compulsory military service." Upon the hearing it developed that Larrucea is a citizen of the Kingdom of Spain domiciled within the United States, that he had filed his declaration of intention to become a citizen of this country, and that he was then in custody of the proper authorities for evading the Selective Service Law. He claimed that owing to the treaty he was exempt from all forms of compulsory military service in the United States notwithstanding the Selective Service Law of May 18, 1917, c. 15, 40 Stat. 76. This law provides that the draft "shall be based upon liability to military service of all male citizens, or male persons not alien enemies, who have declared their intention to become citizens, between the ages of 21 and 30 years, both inclusive," and that all persons registered thereunder "shall be and remain subject to draft, * * * unless exempt or excused therefrom as in this act provided." Following the holding of the Supreme Court in the cases above cited it was properly held that the Selective Service Act superseded the treaty with Spain so far as in conflict therewith and that the court could not grant Larrucea any relief, his only remedy being to apply to the political department of the government.

According to the public press the War Department has just announced that Spanish subjects residing in the United States who have not completed their final citizenship in this country are exempt from military service. This announcement was made to counteract the influence of German propaganda that subjects of Spain would be forcibly compelled to serve in the army if they remained in this country. The propaganda appears to have been based upon the holding in the above case. B. S.